IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

FEDERAL TRADE COMMISSION, *Plaintiff,* v. NOVANT HEALTH, INC. and COMMUNITY HEALTH SYSTEMS, INC., *Defendants.*	CIVIL ACTION NO. 5:24-cv-00028-KDB-SCR **REDACTED VERSION OF DOCUMENT FILED UNDER SEAL (ECF 99)**

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF PRELIMINARY INJUNCTION

Even at this preliminary stage, the FTC has presented overwhelming evidence that the proposed transaction would eliminate robust competition between Novant Huntersville and Lake Norman Regional, leaving Eastern Lake Norman Area residents with fewer choices and higher healthcare costs. Defendants ask this Court to ignore that evidence because Lake Norman Regional is small when measured against Novant's entire system. That argument is unsupported by the antitrust laws. If accepted, large hospital systems like Novant would be free to absorb smaller facilities even when there is fierce local competition. This result would be catastrophic for healthcare in North Carolina—big hospital conglomerates would be able to gobble up key local competitors, leading to fewer options, higher costs, and reduced incentive to innovate.

Case in point: Defendants' agreement to merge already caused CHS to [redacted] in Lake Norman Regional [redacted] and [redacted] The proposed transaction has therefore already reduced Defendants' incentives to compete by investing in their hospitals. And while the benefits of this competition

may seem insignificant to a sprawling health system like Novant, they are critically important for local communities that rely on convenient, affordable, and quality healthcare.

Defendants seek to cast aside ordinary course evidence and decades of legal precedent in their attempt to chart a new path for assessing hospital consolidation. They contend that the loss of competition should be excused because Lake Norman Regional is struggling financially and Novant has plans to improve the quality of CHS's facilities. Not only are these assertions irrelevant under the antitrust laws—which ask only whether a transaction may substantially lessen competition—but they are also unsupported by the record. As discussed in Section II, the evidence establishes that CHS has invested millions in Lake Norman Regional over the past decade and that Lake Norman Regional's quality and profitability is comparable to, and in some cases exceeds, that at Novant hospitals. The purported deterioration of Lake Norman Regional is a made-for-litigation narrative that is inconsistent with the factual record.

At this stage, the FTC's burden is merely to show that it has a "fair and tenable" chance of success at the administrative trial. The FTC has far surpassed that burden by demonstrating why this acquisition may eliminate direct competition between Defendants. Faced with similar facts, circuit courts have consistently enjoined hospital mergers by considering the loss of local competition for overlapping inpatient services. *See, e.g.*, *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160 (3d Cir. 2022); *FTC v. Advoc. Health Care Network*, 841 F.3d 460 (7th Cir. 2016); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).[1] Because the proposed transaction may similarly eliminate beneficial local competition, the FTC respectfully requests

[1] Over the past decade, federal appellate courts have assessed six FTC challenges to healthcare provider mergers. But rather than engage meaningfully with this caselaw unfavorable to their position, Defendants instead cite 17 times to a single, distinguishable out-of-circuit district court decision, *FTC v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522 (E.D. Pa. 2020), and 19 times to hospital merger decisions from over two decades ago.

that the Court grant a preliminary injunction.

I. DEFENDANTS' PROPOSED TRANSACTION WILL ELIMINATE IMPORTANT COMPETITION BETWEEN LAKE NORMAN REGIONAL AND NOVANT HUNTERSVILLE

There is no serious dispute that Lake Norman Regional and Novant Huntersville aggressively compete to attract patients and provide quality care. ECF No. 80 ("Mem.") 19-23. Defendants attempt to diminish that local competition by focusing on Novant only as a multi-hospital health system facing competition at a broad "system" level. ECF No. 91 ("Opp.") 10-14. This framing is wrong as a matter of fact and law. While the FTC does not deny that Novant—as one of the largest health conglomerates in the southeastern United States—competes beyond the Eastern Lake Norman Area, Defendants overlook evidence that hospital competition is fundamentally local.

Patients prefer to receive inpatient care close to home. Mem. 11-12.[2] Because access to local healthcare is important for patients, hospitals compete with other nearby hospitals—particularly if those hospitals offer similar services. Mem. 20 n.69.[3] And so, predictably, evidence confirms that Lake Norman Regional and Novant Huntersville have competed aggressively with one another for years. *See* Mem. 13, 19-23.[4] That beneficial competition would be lost following the merger, leading to higher healthcare costs for patients in the area.

Defendants assert that the proposed transaction will not reduce competition because Novant bargains [redacted] As an initial matter, Defendants do not seriously contest that the loss of competition would cause Lake Norman Regional to raise its rates following the transaction—which is reason enough to enjoin the merger. Even when

[2] *See also* [redacted] PX5019 (CHS) at 1; PX1202 (Novant) at 1.
[3] *See also* [redacted]
[4] *See also* [redacted]

focusing on Novant alone, [redacted] because hospital competition is local, Novant's acquisition of Lake Norman Regional would give it additional bargaining leverage to raise its rates.[5] That makes economic sense: a hospital system's total bargaining leverage is derived from the individual significance of each of its hospitals, including due to the presence or lack of local competition.[6]

Defendants also seek to minimize the close competition between Novant Huntersville and Lake Norman Regional by pointing to Atrium, another large hospital system in North Carolina. Opp. 11-13. But the Clayton Act's reach is not limited to mergers between the two largest participants in an industry. *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 216 (D.D.C.), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017). Statewide competition between Novant and Atrium does not dilute the importance of local competition. *See* 4A Areeda & Hovenkamp, *Antitrust Law* ¶ 972a (4th ed. 2016). Indeed, Defendants' argument would lead to an absurd result: Novant would be permitted to acquire Lake Norman Regional because it has other hospitals throughout Charlotte competing with Atrium, while a merger between only Novant Huntersville and Lake Norman Regional could be easily challenged as anticompetitive. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370-71 (1963) (rejecting that a firm could, "without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader").

The Third Circuit recently blocked an analogous merger when one of the largest healthcare systems in New Jersey sought to acquire an independent hospital on which it "place[d] a strong competitive constraint." *Hackensack*, 30 F.4th at 174. Novant Huntersville places a similarly strong constraint on Lake Norman Regional, which consistently identifies

[5] *See* [redacted]
[6] *See* [redacted]

Novant Huntersville as [redacted] Mem. 19-20.[7] That is precisely the local competition that would be lost because of the proposed transaction.

II. DEFENDANTS' ARGUMENTS ABOUT QUALITY ARE IRRELEVANT AND INCONSISTENT WITH THE EVIDENTIARY RECORD

Defendants attempt to defend the proposed transaction by arguing that (1) it would improve the quality of care at Lake Norman Regional, Opp. 14, and (2) CHS will [redacted] Opp. 8. But arguments about whether Novant "might provide better service to patients after the merger" are irrelevant because "the Clayton Act does not excuse mergers that lessen competition . . . simply because the merged entity can improve its operations." *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 792 (9th Cir. 2015). This case presents a good example of why: [redacted] Mem. 30. Assertions about Novant's quality do not alter the fact that, but for the proposed transaction, [redacted] and a core tenet of the antitrust laws "is that corporate growth by internal expansion is socially preferable to growth by acquisition." *Phila. Nat'l Bank*, 374 U.S. at 370.

Regardless, Defendants' arguments about quality are inconsistent with the record and unsupported by the law. If Defendants are contending that Lake Norman Regional lacks sufficient quality to meaningfully compete with Novant Huntersville today, the record belies that claim. If, on the other hand, Defendants are asserting that Novant's purported ability to improve Lake Norman Regional's quality justifies any harm to competition, those claims must be addressed under the rigorous legal standard for assessing efficiencies. *See* Mem. 32-33.

CHS has invested in providing quality care at Lake Norman Regional. Competition

[7] *See also* PX7015 (Conti) at 94-95; PX7021 (Medley) at 78.

with Novant has spurred CHS to invest in Lake Norman Regional. Mem. 26-29.[8] Testimony and ordinary course documents confirm that CHS supports its hospitals, including Lake Norman Regional, and is committed to quality and patient safety.[9]

It is thus unsurprising that there is no statistically significant difference in the quality of care at Lake Norman Regional and Novant Huntersville across the vast majority of quality metrics.[10] In an effort to rebut this evidence, Defendants rely heavily on just one incomplete measure that is insufficient to analyze a hospital's quality.[11] Far more complete and accurate data show that Lake Norman Regional's quality is in fact comparable to that of many Novant hospitals across the Charlotte area.[12] Further, even if there were a quality difference between Defendants, [redacted][13]

Contrary to Defendants' assertions, Opp. 18, Novant's value-based contracts are not necessary to incentivize Lake Norman Regional to decrease its "total cost of care." Insurers seek to reduce total costs primarily by reducing the "unit cost" (i.e., reimbursement rates),[14] and Lake Norman Regional's reimbursement rates are [redacted] than those of Novant Huntersville. Mem. 5. Moreover, according to the Centers for Medicare and Medicaid, Lake Norman Regional is more cost-efficient than both Novant Huntersville and the national average.[15]

The proposed transaction prompted CHS's recent [redacted] CHS sharply

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[8] *See also* PX0003 (Wu Initial Rep.) at 222 Ex. 13 (investment over time).
[9] PX7051 (Benet) at 39-43; PX7036 (Music) at 120-21.
[10] PX0006 (Burns Rebuttal Rep.) ¶¶ 66-83; *see also* PX0008 (Jha Rebuttal Rep.) ¶ 105 [redacted]
[11] PX0002 (Burns Initial Rep.) ¶ 29; *see* PX7036 (Music) at 90; [redacted]
[12] *See* PX0006 (Burns Rebuttal Rep.) ¶¶ 43-48.
[13] PX0006 (Burns Rebuttal Rep.) ¶¶ 132-53 [redacted] *id.* ¶¶ 154-68 [redacted]
[14] [redacted]
[15] PX0006 (Burns Rebuttal Rep.) ¶¶ 234-38.

[redacted] at Lake Norman Regional almost immediately after announcing the proposed transaction in February 2023, converting its capital request status to [redacted][16] While CHS had consistently invested at least [redacted] in Lake Norman Regional since 2017, CHS [redacted] once the merger was announced.[17] Defendants incorrectly assert that [redacted] in Lake Norman Regional, Opp. 7-8, but evidence dispels that claim. As CHS's President and CFO explained, once CHS had Novant's offer, it was [redacted][18] For example, the proposed transaction [redacted][19] The Court should afford no weight to CHS's [redacted] Courts discount actions that even "*could arguably* be subject to manipulation" while a lawsuit was threatened or pending. *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 434-35 (5th Cir. 2008) (emphasis in original). In fact, the mutual decisions to [redacted] are a concrete harm to competition that is already impacting patients in the region.

Defendants fail to satisfy the standard for a failing or "flailing" firm. In arguing that the transaction should be permitted because Lake Norman Regional is purportedly in decline, Defendants fail to address the legal doctrine governing such claims. By failing to even acknowledge the relevant legal standards, Defendants have waived the issue. Regardless, Defendants cannot satisfy the stringent "failing firm" defense because Lake Norman Regional is

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[16] *See* PX2363 (CHS) at 1; *see also* PX1004 (Novant) at 39 [redacted]

[17] PX0005 (Tenn Rebuttal Rep.) ¶¶ 30, 215.

[18] PX7046 (Hammons) at 237-38.

[19] *See* PX2042 (CHS) at 4 [redacted] PX2168 (CHS) at 15; PX2128 (CHS) at 1; PX7039 (Novak) at 48, 51-52; PX7046 (Hammons) at 177-78.

not "in imminent danger of business failure." *FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281, at *57 (N.D. Ohio Mar. 29, 2011).[20] Defendants similarly cannot make a compelling "flailing firm" argument—the "Hail-Mary pass of presumptively doomed mergers," *ProMedica*, 749 F.3d at 572—which seeks to justify a merger based on a company's supposed competitive decline. While Lake Norman Regional's performance has actually been steady or increasing in recent years,[21] even applying Defendants' proffered misleading rate of decline, *see* Opp. 30-31, it "would take nearly 100 years" to satisfy the flailing firm standard.[22] Moreover, CHS has less anticompetitive means to support Lake Norman Regional, such as non-merger [redacted][23] Finally, Lake Norman Regional is not merely "technically 'profitable'" as Defendants concede, Opp. 8, but rather is viewed as a [redacted][24] Lake Norman Regional is projected to earn [redacted] in profits this year[25] and is among CHS's [redacted] hospitals.[26]

III. THE PROPOSED TRANSACTION IS PRESUMPTIVELY ILLEGAL

Defendants' proposed transaction is presumptively illegal by wide margins. Even under various scenarios in Defendants' favor, the merger exceeds well-established thresholds for predicting likely anticompetitive effects.

Geographic Market: Eastern Lake Norman Area. Testimony, documents, and expert analysis all support that the Eastern Lake Norman Area is a relevant geographic market. Mem.

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[20] A defendant bears the burden to show (1) a "grave probability of a business failure," (2) "dim or nonexistent" prospects of reorganization in bankruptcy, and (3) that the proposed acquirer is "the only available purchaser." *United States v. JetBlue Airways Corp.*, 2024 WL 162876, at *28 (D. Mass. Jan. 16, 2024) (quotation omitted).
[21] PX0005 (Tenn Rebuttal Rep.) ¶¶ 118-28.
[22] PX0005 (Tenn Rebuttal Rep.) ¶ 129.
[23] PX1295 (Novant) at 11; PX2150 (CHS) at 25-26.
[24] [redacted] PX7036 (Music) at 64; PX2286 (CHS) at 2-3, 7.
[25] PX2380 (CHS) at 1; PX7036 (Music) at 64.
[26] PX2305 (CHS) at 32 [redacted]

10-15. Defendants' arguments to the contrary are premised on factual inaccuracies, unsupported by economic analyses, and contrary to legal precedent. *See* Opp. 21-25.

Market participants, including Defendants themselves, routinely assess and strategize by focusing on narrow communities—like the Eastern Lake Norman Area—in recognition that patients prefer to receive healthcare services close to home. *See* Mem. 11-14. For example, Novant strategizes to grow share in its [redacted][27] which includes [redacted][28] [redacted][29] [redacted] also consider [redacted] The existence of a larger market does not negate the existence of narrower markets. *United States v. Cont'l Can*, 378 U.S. 441, 458 (1964); *see also FTC v. Hackensack Meridian Health, Inc.*, 2021 WL 4145062, at *17 (D.N.J. Aug. 4, 2021). Further, hospitals cited by Defendants as relevant competitors, [redacted][30]

It is irrelevant that some hospital/insurer contracts may be negotiated at a system or statewide level. *See* Opp. 23-24. While insurers commonly offer health plans in broad markets, courts assessing relevant antitrust markets consider whether those insurers look to narrower geographies to ensure that their health plan is attractive locally. *See, e.g.*, *Hackensack*, 2021 WL

[27] *E.g.*, PX7027 (Ehtisham) at 54-56 (discussing PX1093 (Novant)); PX7038 (Riley) at 90-92 (discussing PX1208 (Novant)); *see* Mem. 12-13.
[28] PX7038 (Riley) at 37; PX7027 (Ehtisham) at 42-43.
[29] *See* [redacted]
[30] [redacted]

4145062, at *17-18. Here, evidence confirms that insurers view the Eastern Lake Norman Area as economically significant and increasingly important. [redacted] it would be difficult, if not impossible, to successfully market a plan throughout the Eastern Lake Norman Area without any of the area's hospitals in-network. Mem. 12.[31]

Economic evidence likewise confirms that the Eastern Lake Norman Area is a relevant geographic market. The Eastern Lake Norman Area satisfies the hypothetical monopolist test ("HMT"), Mem. 14-15, which circuit courts consistently hold can independently establish a relevant market, *see, e.g.*, *Advocate*, 841 F.3d at 464, 468; *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 341 (3d Cir. 2016). [redacted][32] [redacted][33] Thus, the Eastern Lake Norman Area satisfies the HMT under even the most flawed assumptions in Defendants' favor.

Defendants mistakenly interpret precedent to require that, for a market to be relevant, insurers must be unable to market any product that excludes just *Defendants'* hospitals. Opp. 23 [redacted] The relevant inquiry in an HMT, though, relates to "*all* of the hospitals in the geographic market." *See Hackensack*, 30 F.4th at 170-71 (quotation omitted, emphasis in original). [redacted]

[31] *See also* [redacted]
[32] *See generally* PX0005 (Tenn Rebuttal Rep.) ¶¶ 74-117.
[33] PX0007 (Wu Rebuttal Rep.) at 209 Ex. 7 [redacted]

[redacted][34] The evidence confirms that insurers are unable to successfully market a product throughout the Eastern Lake Norman Area that excludes all area hospitals.

Defendants depend on widely discredited patient-flow data to claim that the market is too narrow because some area residents seek care elsewhere. Opp. 22. Defendants' approach is wrong for two reasons. First, Defendants overstate the number of patients who leave the Eastern Lake Norman Area by including services that neither of Defendants' local hospitals offer (e.g., coronary bypass).[35] Including these services, many of which no Eastern Lake Norman Area hospital offers, increases the appearance of patient outflow because 100% of patients will leave the area for care. But the proposed transaction implicates, and thus the inquiry should be focused on, overlapping services. *See infra*. When non-overlapping services are properly excluded, over two-thirds of Eastern Lake Norman Area residents seek care within this geographic market.[36] Second, Defendants' analysis relies heavily on *FTC v. Tenet Health Care Corp*., 186 F.3d 1045 (8th Cir. 1999), which applied the now-discredited Elzinga-Hogarty test for defining geographic markets based on patient-flow data, *see Advocate*, 841 F.3d at 469-73 (describing the test's "silent majority" fallacy). Numerous courts have rejected this test because it results in overbroad markets, and this Court should do the same. *See id.* at 470; *Hershey*, 838 F.3d at 340-41.

Service Market: Overlapping inpatient commercial GAC services. The evidence, Mem. 9, and a consistent line of hospital merger decisions amply support the FTC's alleged relevant service market. *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075-76 (N.D. Ill. 2012); *see also Hackensack*, 30 F.4th at 166; *ProMedica*, 749 F.3d at 566.[37] Defendants claim the

[34] PX0005 (Tenn Rebuttal Rep.) ¶¶ 202-12; [redacted]

[35] PX0005 (Tenn Rebuttal Rep.) ¶¶ 10-11, 85-95.

[36] PX0001 (Tenn Initial Rep.) at tbl.4.

[37] The FTC's alleged service market is so well established that it is uncontested in almost all

FTC's market is "gerrymandered" because it excludes services not offered at Lake Norman Regional and Novant Huntersville, outpatient services, and services sold to non-commercial insurers. Opp. 26. Not so. First, non-overlapping services are properly excluded because the proposed transaction will have minimal impact on services for which the parties do not compete.[38] *See, e.g.*, *ProMedica*, 749 F.3d at 566 (excluding services where the acquired hospital's market share "was nearly zero"). Second, outpatient services are properly excluded because they are neither close substitutes for inpatient services nor offered under similar competitive conditions. *See, e.g.*, *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990) ("[S]ervices are not in the same product market merely because they have a common provider.").[39] Third, inpatient GAC services are sold to non-commercial insurers at prices largely set by regulation and many customers are not eligible for government plans.[40]

Defendants' transaction is not a borderline case. The proposed transaction's presumptive illegality is not a close call, surpassing legal thresholds in both of the FTC's alleged relevant geographic markets. Mem. 16-17. After appropriately excluding non-overlapping services, the FTC's economic expert, Dr. Steven Tenn, confirmed these thresholds are also easily exceeded when using revenue to measure market shares, *contra* Opp. 31, or when measuring market shares based on all patients living in the alleged geographic markets, *contra* Opp. 29.[41]

Dr. Tenn conservatively assumed Atrium Lake Norman was already open and operating

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hospital merger cases. *See, e.g.*, *Advocate*, 841 F.3d at 467-68 (collecting cases).
[38] PX0005 (Tenn Rebuttal Rep.) ¶¶ 85-95.
[39] For contrary support, Defendants rely on a single unpublished opinion, reviewing a decision that had not "stated its findings with the precision that would facilitate appellate review." *United States v. Carilion Health Sys.*, 1989 WL 157282, *3 (4th Cir. 1989) (table decision).
[40] PX0001 (Tenn Initial Rep.) ¶ 83; PX0003 (Wu Initial Rep.) ¶ 48; Mem. 9 n.19.
[41] PX0005 (Tenn Rebuttal Rep.) ¶¶ 154-57 (revenue); PX0001 (Tenn Initial Rep.) ¶¶ 148-53 (patient-based shares).

at approximately full capacity,[42] obviating Defendants' criticism that the FTC attributed no share to Atrium in the Eastern Lake Norman Area.[43] Opp. 25. Defendants also wrongly claim the FTC [redacted][44] Opp. 13, 30. [redacted][45]

IV. DEFENDANTS' REMAINING ARGUMENTS ARE PAPER TIGERS

Defendants miscast the evidentiary hearing as a full merits trial. Defendants imply the FTC is seeking an "automatic preliminary injunction." Opp. 16. To the contrary, the FTC has marshalled volumes of evidence to demonstrate that a preliminary injunction is warranted. Under Section 13(b), the Court's role in evaluating this evidence is limited: the question is not whether the FTC is likelier than not to prevail, but rather whether the FTC shows "it has a fair and tenable chance of ultimate success on the merits." Mem. 6-8.

Defendants improperly cite various permanent injunction cases, outside the context of the applicable Section 13(b) standard, in an apparent effort to heighten the FTC's burden. *See, e.g.*, Opp. 15. Defendants then try to re-write the Section 13(b) standard by arguing that "win or lose," the administrative action inevitably ends after the preliminary injunction hearing. Opp. 4, 14. This is false. That Defendants may abandon the transaction does not justify a different legal standard or overcome a presumption in favor of an injunction where the FTC has shown a

[42] PX0001 (Tenn Initial Rep.) ¶¶ 142, 145 & tbl.5; *cf.* [redacted]

[43] *See* PX0001 (Tenn Initial Report) at tbl.5 [redacted]

[44] Defendants also argue the FTC does not account for CaroMont's new facility. [redacted]

[45] [redacted]

likelihood of success. *See FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1344-45 (4th Cir. 1976) (applying the Section 13(b) standard despite argument that "Food Town may be forced or elect to rescind" the merger).

Defendants' "commitments" and threats are unsubstantiated. Defendants tout a March 2024 letter from Novant to the North Carolina Attorney General,[46] listing "commitments" that they assert will improve Lake Norman Regional. This letter is no more than counsel-created advocacy,[47] though, and is admittedly not legally binding or enforceable.[48] The "commitments" are unsubstantiated in many cases and involve nothing more than a promise to maintain the status quo at Lake Norman Regional in others.[49] For example, Novant boasts that it will invest at least [redacted] in Lake Norman Regional and Davis each year,[50] but before the proposed transaction was announced, CHS's average annual capital expenditure from 2017 to 2022 was [redacted][51] [redacted] Opp. 3, 8. But the evidentiary record confirms that [redacted][52] For example, behavioral health provider [redacted] to which CHS's regional president responded: [redacted][53]

Defendants' alleged efficiencies are not cognizable. As the FTC's forthcoming motion

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[46] PX1258 (Novant).
[47] PX7056 (Ehtisham) at 16-17.
[48] PX7056 (Ehtisham) at 23-24.
[49] PX1258 (Novant) at 1-3. *Compare id.* at 5, *with* PX5099 (CHS) (financial assistance program).
[50] PX1258 (Novant) at 1.
[51] *See* PX0003 (Wu Initial Rep.) at 222 Ex. 13 (investment over time).
[52] *See* PX7046 (Hammons) at 168 [redacted] Furthermore, Davis is outside of the relevant market for inpatient GAC services.
[53] PX2011 (CHS) at 1.

in limine will discuss, most of Defendants' claimed "efficiencies" amount to advocacy commissioned by counsel in anticipation of litigation.[54] Defendants must support claimed efficiencies with facts and assumptions relied upon so they may be independently verified. *See Illumina, Inc. v. FTC*, 88 F.4th 1036, 1060 (5th Cir. 2023). Here, Defendants have generally objected to discovery into the underlying analysis by asserting attorney-client and work-product privilege.[55] By claiming privilege, Defendants have foreclosed verifiability. Defendants also fail to demonstrate that any efficiencies are merger specific or that the benefits will be passed on to consumers. *Hershey*, 838 F.3d at 350-51. The Court should not credit these "efficiencies."

The equities strongly favor a preliminary injunction. Defendants cannot overcome the public equities that support a preliminary injunction for the duration of the administrative proceeding. Finding that the FTC has demonstrated a likelihood of success "creates a presumption in favor of a preliminary injunction." *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 918 (E.D. Mo. 2020). The principal equity in favor of an injunction is "the public interest in effective enforcement of the antitrust laws." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726-27 (D.C. Cir. 2001). Defendants do not articulate why the transaction's purported benefits would not be available after the administrative proceeding. *See id.* In contrast, interim harm is likely, including from shared competitively sensitive information and layoffs.[56] Finally, Defendants' suggestion that they may abandon the transaction is a private, not public, equity that cannot justify a decision in their favor. *E.g.*, *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 87 (D.D.C. 2015).

CONCLUSION

The FTC requests that the Court preliminarily enjoin the proposed transaction.

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[54] [redacted]

[55] PX7020 (Ehtisham) at 66-67, 197-200.

[56] *See* Mem. 35; *cf.* PX5216 (WHQR) at 1 (post-merger layoffs at Novant New Hanover).

Dated: April 29, 2024

Respectfully submitted,

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